Supreme Court, U.S.
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No. 95-1320

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

MITCHELL BROWN,

Petitioner,

V.

JOSEPH PASKVAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION RESTATED FOR REVIEW

May a finding of race-based denial of equal protection in the workplace be premised upon evidence that a police officer was arbitrarily denied a promotion under circumstances that suggest that he was singled out for special treatment, that the decision was admittedly influenced by racially motivated protests of community groups and by political pressure from a city councilman responding to such pressures, when the non-discriminatory reasons proffered by the decision makers were clearly pretextual?

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MITCHELL J. BROWN AND
HOWARD E. RUDOLPH,

Petitioners,

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Joseph Paskvan, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Sixth Circuit's opinion below. That opinion is reprinted in the petition of certiorari at Appendix A-1. The petition should be denied since the Sixth Circuit's opinion does not conflict with the decisions of this Court or another United States Court of Appeals. Rather, the petition asserts that the jury and Court of Appeals erroneously applied the facts in arriving at their decisions.

STATEMENT OF THE CASE

Respondent, Joseph Paskvan has been a City of Cleveland Police Officer since 1973. He has been involved in nine shootings in the line of duty. Because he was stationed in areas of the city largely populated by minorities, all nine shootings involved minorities. The Respondent was found to be legally justified in each of the nine shootings and no criminal charges or even department disciplinary proceedings were brought against him with respect to any of the shootings. Further, Officer Paskvan was found to have complied with all departmental rules under the Manual of Rules and Regulations for the Conduct and Discipline of Officers and Employees of the Division of Police, Chapter 10 - Use of Deadly Force, dealing with judgment.

Officer Paskvan took and passed a written promotional examination for the position of sergeant in June, 1987. He was certified as eligible

for promotion to sergeant and was placed third on an eligibility list as a result of his score on the exam.

At trial, Officer Paskvan showed that it was the normal practice of the City of Cleveland to promote officers by rank order based on the results of civil service tests. Reviewing the last two certified eligibility list for the Position of Sergeant of Police in 1982 and 1985, it was shown that all police officers who were both physically able and willing to become sergeants were in fact promoted in rank order.

The City promoted candidates 1 through 50 on the 1987 eligible list, except for Officer Paskvan. Since it was highly unusual for the City not to promote using rank order on the list, this fact made the Petitioner's decision suspect.

At the time the City decided not to promote Officer Paskvan, a number of black city councilmen, including John Barnes, who was the Chairman of the Public Safety Committee of Cleveland City Council, were urging the Petitioners to remove him from his present duties. Councilman Barnes wrote a letter to Chief Rudolph, indicating that various community organizations had targeted Officer Paskvan because of his history of altercations with minorities. Councilman Barnes identified several of the organizations which protested against Officer Paskvan, such as the NAACP, as primarily minority. Councilman Barnes received petitions from these minority organizations demanding the removal of

Officer Paskvan from the police force and presented them to Petitioner Rudolph. Finally, Councilman Barnes discussed his concern about the possible repercussions of Officer Paskvan being promoted to sergeant with Safety Director Brown.

The denial of Officer Paskvan's promotion to sergeant was merely part of a continuing effort by the Petitioners to unlawfully punish him to obtain political support from the black community. For instance, the City relegated him to permanent duty in the gymnasium, an assignment which Officer Paskvan eventually challenged. An arbitration order ruled that the assignment was "arbitrary, discriminatory or unreasonable" and ordered the City to transfer Officer Paskvan out of the gym. Officer Paskvan was also deprived of secondary employment rights by order of Petitioner Rudolph, despite the fact that approval of such employment was recommended by Officer Paskvan's district or bureau commanders. Officer Paskvan again challenged this policy by arbitration and again the City's treatment of Officer Paskvan was held to be arbitrary and discriminatory.

Other police officers were shown to have been involved in shootings, but unlike Officer Paskvan, they were not singled out for arbitrary and discriminatory treatment. Officer Robert Tolliver, a black officer for the Cleveland Police Department, testified that he has been involved in two shootings of minority citizens, including one fatal shooting. Officer Tolliver was promoted to sergeant, after the

two shootings. Also testifying was Lieutenant Gary Gingell, a white officer of the Cleveland Police Department, who testified that he was involved in the shooting of a white male and was promoted to sergeant after the shooting.[1]

Of course, neither of these officers was a white officer involved in the shooting of minority citizens. Councilman Barnes testified that he did not write a letter to Petitioner Rudolph, the Chief of Police, demanding the termination of the black officer who had been involved in shootings in the line of duty.

Under the City of Cleveland's Charter the ultimate decision-maker about promotions of police officers is the Safety Director. Petitioner Mitchell Brown testified that he decided not to promote

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[1] The Petitioners argue that neither of these individuals are comparable since Officer Paskvan had been involved in more shootings. In spite of the number of shootings Officer Paskvan was involved in, Petitioner Rudolph testified that he would have recommended Officer Paskvan for promotion, except for his involvement with the last shooting. Petitioner Rudolph could not explain why this last shooting was so different as to change his mind about promoting Officer Paskvan except for his statement that Officer Paskvan had exercised poor judgment in shooting the suspect. Thus, Officers Tolliver and Gingell's situations are applicable to this case.

Officer Paskvan based on the recommendation of Petitioner Rudolph and because of community pressure.

Petitioner Rudolph testified that factors looked at when considering an officer for promotion included excessive sick time and discipline. Rudolph testified that Paskvan had no excessive sick time, had no disciplinary action to deny him a promotion for sergeant, had done nothing illegal, had no physical problems that would prevent him from being promoted to sergeant, and there was no budgetary reason to prevent Officer Paskvan's promotion.

At trial, Petitioner Rudolph maintained that he recommended that Petitioner Brown not promote Officer Paskvan because he exercised poor judgment in his last two shootings. However, the evidence was more than sufficient to permit a determination by the jury that this reason was pretextual. Petitioner Rudolph, while a lieutenant in charge of the Cleveland Police Department's homicide unit, had conducted the investigation of Officer Paskvan's last two shootings. Rudolph's investigation of both of these shootings determined that Officer Paskvan's actions had not violated any criminal laws. Petitioner Rudolph also testified that Officer Paskvan had been found to have complied with the Police Departments Rules and Regulations in the "use of Deadly Force." Petitioner Rudolph's investigation had found that Officer Paskvan had exercised proper judgment in the use of deadly

force. Further under the Police Department Rules and regulations "if an officer is determined to have used poor judgment by a superior officer, that superior officer shall discipline the officer who has exercised poor judgment." Petitioner Rudolph admitted that he had not recommended any discipline of Officer Paskvan for these shootings. Petitioner Rudolph confirmed that he and Safety Director Brown were influenced by the community outcry when deciding not to promote Officer Paskvan.

Another pretextual reason offered by Petitioner Rudolph for not appointing Officer Paskvan to a sergeant's position in a desk job, was that Paskvan would have been supervising other officers in that capacity and that Paskvan was unfit for supervisory duties. However, that alleged motive was called into question by the testimony elicited from Officer George Isherwood, a sergeant for the Cleveland Police Department and the current supervisor of Officer Paskvan. Isherwood testified that as supervisor, he has observed that Officer Paskvan has good judgment. Isherwood has placed Officer Paskvan in charge of the unit's eight other police officers on his days off, and Officer Paskvan had performed Isherwood's duties well.

REASONS TO DENY THE WRIT

I. The Sixth Circuit Correctly Held That The Evidence Presented Was Sufficient to Support the Jury Verdict On Behalf of Officer Paskvan.

Officer Paskvan alleged that the City applied its promotional policy to him in a discriminatory manner in that he was denied promotion for racially discriminatory reasons. Once proven, this allegation clearly entitled Officer Paskvan to judgment, since the discriminatory application of a law or policy that on its face is unobjectionable, such as the City's promotional scheme, can be challenged as a denial of equal protection. Charles v. Baesler, 910 F. 2d 1349, 1356 (6th Cir. 1990), citing, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). (In order to establish an equal protection violation, Plaintiff must show that defendants administered the promotional system with a discriminatory intent or purpose.) See also, Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982)("Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way.")

The Petitioners' assert that Officer Paskvan failed to prove his claim of race discrimination. However, a review of the evidence presented at trial shows that there was ample evidence from which the jury could reach its conclusion that the City applied its promotional scheme to him with

discriminatory intent or purpose. Wesley v. Collins, 791 F. 2d 1255, 1262 (6th Cir. 1986).

The evidence showed that the plaintiff's performance evaluations, over 19 years of service, rated him as an excellent police officer. Since it was highly unusual for the City not to promote using rank order on the list, this fact makes the City's decision suspect. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 266, 267-68, 97 S. Ct. 555, 564-65 (1977) Moreover, the evidence showed the racial controversy surrounding Plaintiff's position on the force. In fact, the Petitioners testified that the public outcry and the media attention did play a role in their decision not to promote. This is direct evidence of discriminatory intent or purpose, and shows that they did not apply their procedures in a "rational and non-arbitrary way." Ciechon v. City of Chicago, supra at 522.[2]

Officer Paskvan presented evidence that the denial of his promotion to sergeant was part of a continuing effort by the City to unlawfully punish

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[2] It is perplexing that Petitioners continue to object to Officer Paskvan's citing Ciechon v., City of Chicago, supra. The Petitioners' argument is flawed since the Seventh Circuit in Ciechon did hold that an equal protection violation had been made out. Ciechon, 686 F. 2d at 522-524.

him to obtain political support from the black community. As stated above, this effort included relegating Officer Paskvan to permanent duty in the police gymnasium and denying him secondary employment approval, which was routinely granted, and was heavily relied upon by the officers for supplemental income.

Both former Police Chief Rudolph and Safety Director Brown admitted that part of their decision was based on the publicity and public demonstrations by minorities and minority organizations. "The jury could reasonably infer that Rudolph and Brown refused to promote Paskvan, in part, because he is white" based on this evidence. Paskvan v. City of Cleveland Civil Service Commission et al. Case No. 94-3593 (6th Cir. November 21, 1995) opinion reprinted in the petition of certiorari at Appendix A-11.

The Petitioners' admitted that at least part of their decision was based upon an impermissible reason, and the jury found that the other reasons offered by them for their punishment of Officer Paskvan, - including the reason offered for the first time at trial, i.e., his alleged poor judgment - were not credible.

Since the Petitioners admitted their discriminatory motive, and the other reasons proffered were simply not credible, all other

reasons, legitimate or otherwise, do not matter. TWA v. Thurston, 469 U.S. 111; 105 S.Ct. 613 (1985).

The testimony of the police officers called who had been involved in shootings but were promoted established that the denial of promotion to Officer Paskvan was for racial reasons. Sergeant Tolliver, a black officer, testified that he was forced to shoot minority suspects, yet he suffered no consequences as a result of his appropriate actions. However, Officer Paskvan, a white officer who shot minorities, suffered severe consequences as a result of his appropriate actions. The testimony by Sergeant Tolliver established that if Officer Paskvan had been black, he would have been promoted to sergeant in 1988.

Additionally, the testimony of former City Councilman and Chairman of the Public Safety Committee, John Barnes, and Defendants Rudolph's and Brown's admission that they listened to him, further shows the intentional nature of the discrimination.

The City's basic premise appears to be that the District Court Judge, the jury and the Court of Appeals were all misled into believing that Officer Paskvan's evidence that he was treated in an unprecedented arbitrary fashion meant that he had necessarily made out his equal protection claim. However, it is clear from the opinions below, reprinted with the Petition, that both the trial and

appellate courts understood and applied the correct standard in evaluating Officer Paskvan's equal protection claim and the jury was correctly instructed as to how to evaluate the evidence supporting that claim.

The City fails to either understand or acknowledge that the evidence of arbitrary treatment, while perhaps not sufficient to establish a due process claim, is still evidence that supports the equal protection claim. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 267-68. In this case that evidence, along with the evidence that the decision-makers bowed to racially motivated political pressure, was certainly sufficient to support the jury's verdict, especially in light of the fact that the City offered as alternative motives for their treatment of Officer Paskvan only transparently pretextual reasons. As held by this Court in Hicks v. St. Mary's Honor Center 509 U.S. 502, 113 S.Ct. 2742 (1993), a case the City curiously fails to mention, a finding that an employer has offered false reasons for an employment decision, while not necessarily entitling a plaintiff to judgment, is certainly a factor that would support a further finding that the real motive was discriminatory.

II. Officer Paskvan Was Not Required To Prove Similarly Situated Minority Police Officers Were Treated Differently by the Petitioners To Establish His Equal Protection Claim.

The Petitioners argue that to make out his equal protection claim, Officer Paskvan was required to prove that similarly situated minority officers on his eligibility list were promoted. The Petitioners, however, have overstated the nature of the specificity of the proof of comparability required for an equal protection claim. When assessed correctly, it is clear that the evidence shows that similarly situated minorities were promoted.

First, however, since Officer Paskvan put on direct evidence of discriminatory motive, intent or purpose, through the testimony of the Petitioners Rudolph and Brown, he has established sufficient evidence to sustain his claim under the equal protection clause, and need go no further with respect to prima facie requirements. TWA v. Thurston, 469 U.S. 111; 105 S.Ct. 613 (1985). The jury could have found against the City on the basis of the evidence that racial considerations were a reason for the denial of promotion alone without even looking for other officers who got promotions. TWA v. Thurston, 469 U.S. 111; 105 S.Ct. 613 (1985); McDonald v. Santa Fe Trail, 427 U.S. 273, 282 n. 10. (1976). See also, Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982).

While Title VII case law can be applied to this type of action, in this case, the analytical framework set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, (1981), on which the Petitioners hang their argument, is not applicable. Trans World Airlines, Inc. v. Thurston, 469 U.S. 117, 121, 105 S. Ct. 613, (1985) [The McDonnell-Douglas test is inapplicable when the Plaintiff presents direct evidence of discrimination.]

Further, the McDonnell-Douglas formulation is only one way to prove a prima facie case of discrimination. Ramirez v. Sloss, 615 F. 2d 163, 168 (5th Cir. 1980). As stated in that case: "[C]ourts must not allow the mechanical formula to blind them to the real issue of whether the defendant illegally discriminated against the plaintiff." Id. As held by this Court in Hicks, 509 U.S. at 513, 113 S.Ct. at 2751 the McDonnell-Douglas framework is only a procedural device utilized for proving a case of discrimination in the absence of direct evidence. There is no requirement that mandates that framework be used in every case.

There is nothing magical about the McDonnell-Douglas prima facie test. Many times courts have used different methods to prove whether discrimination had occurred. A prima facie case, whether under the equal protection clause of the Fourteenth Amendment or any federal antidiscrimination statute, requires proof of a state

of facts that makes it more likely than not that there has been discrimination. Cooper v. Federal Reserve Bank of Richmond, 104 S. Ct. 2794, 2799 (1984) It was this standard of proof which the Court instructed the jury to follow in the instant case.

The City can cite no case to indicate that the courts are to slavishly apply the McDonnell-Douglas formula in every case in which racial discrimination by an employer is alleged. Nor does the City point out any decision of this Court or of another circuit that is in conflict with the decision of the Sixth Circuit below.[3]

Discriminatory purpose can be shown either by direct or indirect proof of discriminatory intent. In absence of direct proof, "discriminatory motive...can in some situations be inferred from the mere fact of differences of treatment," International Brotherhood of Teamsters v. United States, 431 U.S. 333, 335, 97 S.Ct. 1843,1854 n.15 (1977). Or the plaintiff can use the seven factors outlined by

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[3] The City points only to the Sixth Circuit decision of Mitchell v. Toledo Hospital, 964 F. 2d 577 (6th Cir. 1992), in arguing that the Court of Appeals in this case did not apply the proper burden in assessing whether Officer Paskvan had sufficiently proven dissimilar treatment. (Petition, p. 14.) The City does not explain why this Court should accept this case to instruct the Sixth Circuit on this alleged internal inconsistency.

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 266, 267-68, 97 S. Ct. 555, 564-65 (1977) to establish evidence of racially discriminatory purpose. The factors are: (1) adverse racial impact; (2) historical background, (3) specific sequence of events leading up to the decision, (4) departure from normal procedure sequence, (5) substantive departure from routine decision, (6) contemporary statements made by decision-makers, and (7) the inevitability of the consequence of the conduct. Ibid.

For the sake of argument, even if Officer Paskvan was required to offer evidence of background circumstances which would support the conclusion that the Petitioners were discriminating against a white individual, that burden was clearly met. The evidence of the unusual circumstances surrounding Officer Paskvan's denial of promotion, including the lack of any justifiable reason in his record, the failure of the City to articulate any credible reason, the intense political pressure by the black city councilmen and minority organizations on the Petitioners that played a part in the treatment of him, is more than enough to raise suspicions as to the motivation in denying him his promotion. As stated in Parker v. Baltimore & Ohio Railroad Co., 652 F.2d 1012, 1017 (D. C. Cir. 1981), practices inconsistent with the usual procedure governing promotions can establish a prima facie case of race discrimination.

Therefore, Officer Paskvan, has shown through direct and circumstantial evidence that the Petitioners acted with a discriminatory motive or purpose, need not avail himself of the McDonnell-Douglas "similarly situated person" framework. The inquiry at this stage of the case became whether the Petitioners had a discriminatory motive in denying Officer Paskvan a promotion. U.S. Postal Service Board of Governors v. Aikens, 460 U.S 711, 103 S. Ct. 1478 (1983). Because there was sufficient evidence presented from which the jury could find that Officer Paskvan was treated differently on the basis of race, the judgment that the City of Cleveland denied Officer Joe Paskvan his right to equal protection under the law should not be reversed.

III. Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

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